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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 147

GEORGIA, PETITIONER

vs.

THOMAS RACHEL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The pertinent opinions of Courts below are as follows:

The remand order and opinion of the United States District Court for the Northern District of Georgia (R. 5-9) is not reported. An Order of the United States Court of Appeals for the Fifth Circuit, staying the remand order of the district court, one judge dissenting, (R. 13-14) is not reported. The opinion of the Court of Appeals, two judges dissenting in part and concurring

in part, is reported at 342 F. 2d 336, (R. 20-35). The *per curiam* opinion of the Court of Appeals denying a rehearing *en banc*, one judge dissenting and another judge dissenting in part and concurring in part, is reported at 343 F. 2d 909 (R. 51).

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals were entered on March 5, 1965 (R. 20-36). A petition for rehearing *en banc* was filed by Petitioner on March 25, 1965 (R. 37-49) and was denied by the Court of Appeals on April 19, 1965 (R. 51). The Petition for Certiorari was filed in this Court on May 15, 1965, and was granted by this Honorable Court in an order dated October 11, 1965 (R. 52).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment to be reviewed was rendered by a majority of the United States Court of Appeals for the Fifth Circuit, reversing the judgment of the United States District Court for the Northern District of Georgia in which the District Court remanded to Fultion Superior Court twenty State of Georgia criminal prosecutions which had theretofore been removed to said District Court under the purported authority of the Civil Rights Acts (28 U.S.C. 1443). The judgment of said Court of Appeals to be reviewed remanded the State Court criminal prosecutions to the United States District Court with directions to hold an evidentiary hearing and to dismiss the prosecution if one finding of fact was made.

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States of America are involved.

The Statutes and Rules involved are the following:

1. Act of 1866 (14 Stat. 27, 28)
2. Act of 1875 (18 Stat. 470, 472)
3. Act of 1887 (24 Stat. 553, 555)
4. Former sections 71, 74, 76, former Title 28 U.S.C. (March 3, 1911, 36 Stat. 1094, 1096, 1097)
5. Act of February 24, 1933, c. 119, 47 Stat. 904
6. Act of March 8, 1934, c. 49, 48 Stat. 399
7. Act of June 29, 1940, c. 445, 54 Stat. 688
8. Act of November 21, 1941, c. 492, 55 Stat. 776
9. Act of June 25, 1948, c. 645, 62 Stat. 683, pp. 844-845
10. Sections 1443 (1) (2); 1446 (a), (c), (d); and 1447 (c) and (d), Title 28, U.S.C. (62 Stat. 938, 1948, 63 Stat. 102, 1949); Section 2107 Title 28 U.S.C.
11. Civil Rights Act of 1964, Secs. 201 (b) (2) and 203, 78 Stat. 241 (pp. 289-291)
12. Sections 3731, 3732 and 1404, Title 18, U.S.C.
13. Section 1981, Title 42 U. S. C.
14. Revised Statutes, Title XIII, the Judiciary, Sec. 641

15. Rules 37 (a) (2), 54 (b) (1), 45 (a), and 59, Title 18, U. S. C.

16. Rule 73 (a), Title 28, U. S. C.

17. Georgia Code Annotated, 26-3005 (Ga. Laws 1960, pages 142 and 143)

18. Rule III, Rules of Practice and Procedure After Plea of Guilty, etc. (292 U. S. 662)

The constitutional provisions, Rules, and statutes involved being somewhat lengthy, their pertinent text is set out in Appendix A for Petitioner, as authorized by Rule 40 (1) (c) or are quoted verbatim in the text of this brief.

QUESTIONS PRESENTED

I. Whether a Notice of Appeal from an order of remand of the District Court entered in twenty State Court criminal prosecutions theretofore removed to said District Court under the purported authority of 28 U.S.C. 1443 is timely, where said Notice of Appeal was not filed within ten days from the entry of said remand order, as required by Rule 37 (a) (2), Fed. R. Crim. P.

Other subsidiary questions fairly comprised within Question I are:

(a) Did the majority of the Court of Appeals err in holding that the ten day time limit for filing a notice of appeal prescribed by Rule 37 (a) (2), Fed. R. Crim. P., has no application to this case because, as held by the majority of the Court, that Rule applies only to criminal appeals after verdict, or finding of guilt, or plea of guilty?

(b) Is not Rule 37 (a) (2) specifically made appli-

cable to an appeal of a remand order entered in a removed criminal case by the provision of Rule 54 (b) (1), Fed. R. Crim. P. that the Criminal Rules apply to criminal prosecutions removed to the United States District Courts from state courts and govern all procedure after removal, except dismissal?

(c) Did the Court of Appeals have jurisdiction to entertain the appeal where the Notice of Appeal of the order of remand was filed sixteen days after the entry of the remand order, and should not Petitioner's timely Motion to Dismiss Appeal on the grounds that the Notice of Appeal was not timely filed have been granted?

II. Assuming *arguendo* that Question I is decided adversely to Petitioner and the merits of the judgment of the Court of Appeals is reached, the following question is presented: Whether the Petition for Removal, which does not allege that any Georgia statute is unconstitutional and does not specifically allege a denial of the equal rights of the Defendants by virtue of the State statute under which they were being prosecuted in the State Court, sets forth a valid ground for removal under Section 1443, Title 28, U.S.C.

Other subsidiary questions fairly comprised within Question II are:

(a) Did the Court of Appeals err in holding that a Petition for Removal need contain only the "bare bones allegation of the existence of a right"; that the instant Petition for Removal did in fact allege the denial of protected rights by State legislation; and that the Petition for Removal adequately alleged that the Defendants suffered a denial of equal rights by virtue of the statute under which they were being prosecuted in the State Court?

(b) Whether the Defendants are entitled to a hearing in a federal forum for the purpose of proving a denial of their rights under a law providing for their equal rights because of State legislation, under the meager allegations of the "notice-type" pleading in their Petition for Removal, and whether the District Court erred in remanding said cases to the State Court upon consideration of the allegations of the Petition for Removal alone, without ordering an evidentiary hearing.

III. Whether the majority of the Court of Appeals erred in reversing the remand order of the District Court and remanding the cases to said District Court with directions to hold a hearing, and in further holding that, if, upon such a hearing, it is established that the removal of the Defendants from the various places of public accommodation was done for racial reasons, it would become the duty of the District Court to order a dismissal of the prosecutions without further proceedings, under the holding of *Hamm v. City of Rock Hill*, 1964, 379 U. S. 306, 85 S. Ct. 384.

Other subsidiary questions fairly comprised within Question III are:

(a) Did the aforesaid directions by the majority of the Court of Appeals to the District Court misconstrue and expand the doctrine of *Hamm, supra,* to mean that all criminal prosecutions arising from removal of persons for racial reasons from places of public accommodation must be abated, without regard to any possible evidence as to the peaceful or nonpeaceful conduct of the particular Defendants involved, and did the aforesaid directions unduly limit the discretion of the District Court in de-

ciding whether the *Hamm* decision was controlling or was distinguishable on other grounds based on the possible evidence adduced at the hearing?

(b) Did the majority of the Court of Appeals err in remanding the case to the District Court with the directions aforesaid, without requiring the removing Defendants to prove in the hearing that the teachings of *Hamm* would not be applied fairly to them by the Georgia Courts if the prosecutions were remanded to the State courts?

(c) Did the majority of the Court of Appeals err in failing to affirm the District Court's order of remand, thus allowing the Courts of Georgia to apply the doctrine of the *Hamm* decision, rendered subsequent to the removal of these cases, to these prosecutions?

STATEMENT OF THE CASE

On August 2, 1963, a Grand Jury of Fulton Superior Court, Atlanta, Georgia, indicted Thomas Rachel and 19 other defendants in separate indictments for violations of Georgia Laws, 1960, pages 142 and 143, a misdemeanor. This statute is codified as 26-3005, Georgia Code Annotated (App. A, page 75).

The misdemeanor with which Thomas Rachel was charged was his failure and refusal, on June 17, 1963, to leave the premises of another, to-wit, Lebco, Inc., doing business under the name of Lebs on Luckie Street after having been requested to leave said premises by the person in charge.

The indictments returned against the other 19 defendants involved here contained identical allegations to the Rachel indictment with the exception that in some

instances the misdemeanor was alleged to have been committed on another date and at a different restaurant in Fulton County, Georgia.

On February 17, 1964, the Defendant Rachel and the 19 other Defendants filed a Petition for Removal in the United States District Court for the Northern District of Georgia, under the purported authority of Sections 1443 (1) (2) and 1446, Title 28, U. S. C. (R. 1-5)

Briefly stated, the removal petition alleged that the State of Georgia by statute was perpetuating customs and serving members of the Negro race in places of public accommodation on a racially discriminatory basis, and on terms and conditions not imposed on the white race. They further alleged that they were being prosecuted for acts done under color of authority derived from the Constitution and laws of the United States, and for refusing to do an act inconsistent therewith. (R. 1-5)

The next day after filing of the removal petition, i.e., on February 18, 1964, United States District Judge Boyd Sloan issued an opinion and order remanding said cases to Fulton Superior Court, stating in part, "the petition for removal to this Court does not allege facts sufficient to justify the removal which has been effected." (R. 5-9)

On March 5, 1964, the Defendants filed a Notice of Appeal from the order of remand to the Fifth Circuit Court of Appeals. (R. 9)

The Defendants filed with the Fifth Circuit Court of Appeals a Motion for Stay Pending Appeal, on March 12, 1964.

On March 12, 1964, a hearing was held before a three

Judge panel of the Fifth Circuit Court of Appeals on the motion for stay of the remand order of the District Court. Petitioner, the State of Georgia, filed a Motion to Dismiss Appeal on two grounds: (1) that the remand order of the District Court was not reviewable on appeal or otherwise, and (2) the Notice of Appeal was not timely filed, having been filed more than ten days from date of the remand order. (R. 10-13)

After an oral hearing, the majority of the Fifth Circuit Court of Appeals by a 2-1 division granted the stay. District Judge G. Harrold Carswell, Northern District of Florida, dissented, saying, "I would, therefore, grant appellee's motion to dismiss." (R. 13-14)

Thereafter, after extensive oral argument before the Court of Appeals (R. 19), said Court on March 5, 1965, entered an opinion by a divided three-judge Court reversing the judgment of the District Court, and remanding the case to the lower Court with instructions to hold a hearing and to dismiss the prosecutions, if it is established that the removal of the Defendants from the various places of public accommodation was done for racial reasons. Two Judges dissented in part and concurred in part. (R. 20-35)

A timely Petition for Rehearing En Banc was filed by the State of Georgia, Petitioner (R. 37-49) and was denied in a *per curiam* opinion of the Court of Appeals entered on April 19, 1965, with one Judge dissenting and another Judge dissenting in part and concurring in part (R. 51).

This Honorable Court granted certiorari in an order dated October 11, 1965 (R. 52)

The jurisdiction of the Court of first instance, the

United States District Court for the Northern District of Georgia, was invoked by the removing Defendants under the purported authority of Sections 1443 and 1446 (c) (d), Title 28, U.S.C. (R. 4, 5).

SUMMARY OF ARGUMENT

I

Only three very basic and important grounds for reversal are urged by Petitioner. First, the Court of Appeals had no jurisdiction to consider the appeal, inasmuch as the Notice of Appeal of the order of remand was filed six days too late. The majority of the Court of Appeals has held, in the first opinion known to counsel for Petitioner since the 1948 enactment of Title 18, U.S.C., that the ten-day time limit of Rule 37 (a) (2), Fed. R. Crim. P. for filing a notice of appeal from an order in a criminal case applies only to criminal appeals after verdict, or finding of guilt, or plea of guilty. This novel construction of one of the basic Criminal Rules originally promulgated by this Honorable Court and subsequently incorporated by reference in an Act of Congress in 1948, alone demands reversal. One Judge of the panel dissented on this ground alone both in the opinion on the merits and on the petition for rehearing.

II

Secondly, the Petition for Removal completely fails, according to all federal judicial precedent, to set out a valid ground for removing State prosecutions to a federal district court for trial. Petitioner urges that there is no requirements for a hearing of the allegations of the removal petition and that removability must stand or fall upon the allegations of the petition. All federal case precedent, including that of this Honorable Court, sup-

port this position, and Petitioner strongly maintains that no error was committed by the District Court in remanding the cases without an evidentiary hearing. The remand order of the District Court should have been affirmed.

III

(a) Finally, even if Petitioner's first two grounds are decided adversely to us, the Court of Appeals should be reversed because the majority opinion has directed the District Court to look for only one criteria on the hearing, and to dismiss the *State Court prosecutions* if that single element is found from the evidence. That element is, of course, the finding that racial reasons were the cause of the removal of the *Rachel, et al,* defendants from the various restaurants. This virtual mandate to the District Court unduly limits his judicial discretion in considering whether or not the prosecutions are in fact controlled by *Hamm,* supra. Many distinguishing factors might be raised by the evidence on such a hearing. Were the defendants peaceable and non-violent in their demonstrations? Were the restaurants places of public accommodation coming under the purview of the Civil Rights Act of 1964? Under the directions of the Court of Appeals, the District Court could consider none of these factors, if the racial factor alone were found.

(b) Further, the Court of Appeals by its remand to the District Court with directions ignores the fact that the Supreme Court of Georgia has recognized and followed the *Hamm decision* and has abated five similar State Court prosecutions. *Bolton, et al* v. *State of Georgia,* 220 Ga. 632, decided February 8, 1965. The *Hamm* case had not been decided when these (*Rachel, et al*) prosecutions were pending in the Georgia Courts, and the Georgia Courts have not had an opportunity to consider

these cases in connection with the *Hamm* doctrine. They should be afforded that opportunity, as pointed out by Circuit Judge Bell in his partial dissent (R. 35). The action of the majority of the Court of Appeals amounts to a finding that the Courts of Georgia will not apply *Hamm* fairly to these Defendants before such courts have even been given the opportunity to do so. This casual treatment of the Georgia Courts involves jeopardy to our dual system of courts, state and federal, as pointed out by Circuit Judge Bell. (R. 35). Petitioner feels that, if these cases are remanded to the District Court for a hearing, contrary to Petitioner's other grounds, *at the very least* these Defendants should be required to prove that the Georgia Courts will not treat them fairly, in he light of *Hamm*. If they cannot prove this, the cases should be remanded to the State Courts. The District Court should not have its hands tied by the erroneous directions of the majority of the Court of Appeals, in limiting the hearing to one issue only.

(c) Counsel for Petitioner are not concerned in this brief with the merits of the State Court prosecutions against these Defendants, and as to the eventual outcome of same if they are remanded to the State Courts. We *are* deeply concerned with the grave and highly important constitutional question of whether a federal appellate court should accept jurisdiction over State Court criminal prosecutions and virtually order dismissal of the actions, without ever giving the State Courts a chance to reconsider the cases in the light of the latest decision from this Honorable Court. Particularly is this so in view of the *Bolton* decision by the highest Court of Georgia, which proves conclusively that Georgia Courts are following the decisions of the United States Supreme Court in racial controversies.

For the foregoing reasons, Petitioner respectfully insists that the decision of the Fifth Circuit Court of Appeals should be reversed.

ARGUMENT

I. THE NOTICE OF APPEAL OF THE REMAND ORDER WAS NOT TIMELY FILED AND PETITIONER'S TIMELY MOTION TO DISMISS APPEAL SHOULD HAVE BEEN GRANTED

The Court of Appeals, Judge Whitehurst dissenting, held that Rule 37 (a) (2) applies only to criminal appeals "after verdict or finding of guilt . . . or plea of guilty," citing *Nye* v. *United States,* 1941, 313 U. S. 28, 43-44. Therefore, the Court held, that Defendants' notice of appeal was timely, even though filed sixteen days after entry of the remand order. Petitioner respectfully maintains that this was erroneous.

(a) Rule 37 (a)(2) controls the time limit for filing a notice of appeal in a criminal case both before and after verdict.

The history of the creation of the Rules of Criminal Procedure require application of Rule 37 (a) (2) to the instant case.

By the Act of March 8, 1934, c. 49, 48 Stat. 399, amending the Act of February 24, 1933, c. 119, 47 Stat. 904, the Supreme Court was given authority to prescribe "rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty in criminal cases . . ."

Pusuant to the above Act, the Supreme Court by order

dated May 7, 1934 and entitled "Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in criminal cases brought in the District Court of the United States and in the Supreme Court of the District of Columbia" adopted thirteen rules as the "Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases in District Courts of the United States . . . and in all subsequent proceedings in such cases in the United States Circuit Court of Appeals . . . and in the Supreme Court of the United States." 292 U.S. 661.

The 1934 "after verdict" enabling act did not require the Court to submit these rules to Congress; they were therefore made effective September 1, 1934 by the Court.

Rule III of these rules, and the predecessor to Rule 37 (a) (2), provided in part that "An appeal shall be taken within 5 days after entry of *judgment of conviction* . . ." 292 U. S. 662 (emphasis added)

It is clear that Congress, under the 1934 Act, intended the Supreme Court to promulgate only "after verdict" rules. It is equally clear that the Supreme Court intended the rules adopted May 7, 1934 to apply only to "after verdict" cases. This is manifested by the title of the order adopting the rules, and by the language of Rule III limiting appeals to those cases where there has been a judgment of conviction. If there were no judgment of conviction there could be no appeal as the case had not yet reached the necessary "after verdict" stage. Of course, in such circumstances the 5 day period for appeal was inapplicable.

By the Act of June 29, 1940, c. 445, 54 Stat. 688, Con-

gress gave the Supreme Court the authority to prescribe Rules of Criminal Procedure for the District Court of the United States governing poceedings in criminal cases prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty. The Act also required the submission of these rules to Congress. Under the authority of this Act, the Supreme Court promulgated Rules 1-31 and 40-60 by order dated December 26, 1944. 323 U. S. 821. The Supreme Court, by letter dated December 26, 1944, requested the Attorney General of the United States to report these rules to the next regular session of Congress. 327 U. S. 823. This was done by a Letter of Submittal from the Attorney General of the United States to Congress, dated January 3, 1945. 327 U. S. 824. The first regular session of Congress adjourned on December 21, 1945. The rules therefore became effective on March 21, 1946 as provided by Rule 59.

By Order dated February 8, 1946 the Supreme Court prescribed rules 32-39 pursuant to the "after verdict" enabling Act of 1933, as amended. The Court made those rules effective on the same date rules 1-31 and 40-60 became effective. The Court further ordered that both the "prior to verdict" rules and the "after verdict" rules be consecutively numbered and known as the Federal Rules of Criminal Procedure, 327 U. S. 825. Rules 32-39 were not submitted to Congress. There was no need to submit them. The 1933 Act, as amended, did not require submission of the rules for them to become effective.

It is obvious from the February 8, 1946 order that the Supreme Court intended Rules 1 through 60 to serve as a complete set of Rules to govern criminal proceedings. This is manifested by all of the Rules becoming effective on the same date, and by the fact that the Court titled the

rules as the Federal Rules of Criminal Procedure. If these rules were intended to be separated into two sets, one embracing "verdict and before verdict" proceedings and the other "after verdict" proceeding, as Judge Tuttle, speaking for the majority of the Court of Appeals, advocates, it is doubtful that the court would have gone to the difficulty of making them effective on the same day. It is even more doubtful that the Court would order the rules numbered consecutively or title them the Federal Rules of Criminal Procedure. It seems more reasonable to believe the court would have kept the "before verdict" rules separate from the "after verdict" rules and titled them as such. This reasoning is further supported by the fact that the old rules I through XIII now replaced by Rules 32-39 were in fact known as the "Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases . . ."

The Supreme Court had the authority under the 1933 and 1940 enabling Acts to prescribe all rules to govern any and all proceedings in a criminal case. It is obvious from its above described actions that this Court intended Rules 1 through 60 to serve all criminal proceedings before and after verdict, without regard to which enabling act authorized promulgation of a particular rule.

If a distinction as to the application of Rules 1-31 and 40-60, and Rules 32-39 ever existed because the 1940 Act required submission of the rules to Congress and the 1933 Act did not, it no longer exists. There is no merit in the contention that Rules 32 through 39 have not been submitted to Congress. By the Act of June 25, 1948, c. 645, 62 Stat. 683, entitled "An Act to Revise, Codify, and Enact into Positive Law Title 18 of the United States Code," Congress enacted into law all sixty

Federal Rules of Criminal Procedure. Rule 37 (a) (2) is specifically incorporated by reference under Section 3732 on page 845 of that Statute. Clearly Congress intended the Federal Rules of Criminal Procedure to apply to all criminal proceedings, whether before or after verdict.

Petitioner's viewpoint is further supported by the language of Rule 37 (a) (2), which reads as follows:

> "2. *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. *An appeal by the government when authorized by statute may be taken with 30 days after entry of the judgment or order appealed from*" (Emphasis added)

The last sentence allows thirty days for an appeal by the government when authorized by Statute. 18 U.S.C. 3731 (App. A, p. 66) authorized appeal by the government in criminal cases in the following instances:

(1) from a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof;

(2) from a decision arresting a judgment of conviction for insufficiency of the indictment or information;

(3) from a decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

One and three of the foregoing are *"before verdict appeals."* The government is also authorized a *"before verdict appeal"* of an order suppressing evidence in a narcotics case and in certain internal revenue cases. (18 U.S.C. 1404). In fact it is the rule rather than the exception that the government's right to appeal is in "before verdict" circumstances. If Rule 37 (a) (2) applies only to "after verdict" situations as urged by the Court of Appeals, why does the last sentence of the Rule deal with "before verdict" appeals? The Court of Appeals' reasoning becomes even more illogical when combined with their interpretation of the 1933 and 1940 enabling Acts. Accept for the moment *arguendo* that Rules 32 through 39 applied only to "after verdict" rules and that 1-31 and 40-60 applied only to "prior to and including verdict" rules. (This of course ignores the 1948 Act codifying the Rules). Since Rule 37 (a) (2) was promulgated under the "after verdict" enabling Act of 1933, the last sentence of the rule dealing with Appeals by the government must be limited to "after verdict" appeals only. Therefore, Rule 37 (a) (2) would be a nullity as to "before verdict" appeals as authorized by 18 U.S.C. 3731 and 18 U.S.C. 1404. Clearly such appeals are authorized.

In *United States* v. *Williams* (4th Cir. 1955) 227 F.2d 149, the Defendant was charged with removing and concealing non-tax paid whiskey. After defendant's motion to suppress evidence had been sustained and the indictment dismissed the Government appealed, but did so more than 30 days after entry of the order. The Fourth Circuit Court of Appeals dismissed the appeal, holding:

> "The order was not a final order made in a civil proceeding, from which an appeal would lie and from which the government would have 60 days in

which to take an appeal, but an order in a criminal proceeding. . . . In so far as it (the order of the lower court) ordered a dismissal of the indictment in the case, it (the appeal) was not taken within 30 days and must be dismissed for that reason under Rule 37 of the Federal Rules of Criminal Procedure. 18 U.S.C.A." (Explanatory words added)

Petitioner's interpretation of Rule 37 (a) (2) is further strengthened by comparing it with its predecessor, Rule III. This rule allowed only for appeal ". . . after entry of *judgment of conviction.*" Rule 37 (a) (2) allows appeal ". . . after entry of the judgment or order appealed from, . . ." Surely if the court had intended Rule 37 (a) (2) to apply only to "after verdict" situations it would have retained the language, "judgment of conviction." By broadening the language to "judgment or order appealed from" the Court removed the "after verdict" limitation. A judgment may be defined as "a decision of a court of justice upon respective rights and claims of the parties to an action." (*Black's Law Dictionary,* Third Edition, 1933, page 1024) Judgments are classified according to the time or stage of the action when rendered. (*Black,* supra, p. 1025). A judgment may be final or interlocutory. An order may be defined as "every direction of a Court or a Judge made or entered in writing." (*Black,* supra, p. 1298). An order may be final or interlocutory. Therefore, the use of the general terms "judgment" and "order" can not be construed in Rule 37 (a) (2) as a "judgment of conviction" limiting appeal to "after verdict" situations only.

Judge Tuttle bases his opinion for the majority of the Court that Rule 37 (a) (2) is inapplicable on *Nye* v. *United States,* 1941, 313 U.S. 28, 43-55. *Nye* is not controlling. It was decided before the Federal Rules of

Criminal Procedure were adopted. *Nye* was not concerned with Rule 37 (a) (2) but rather with its predecessor, Rule III, which we have seen was limited to "after verdict" appeals. Further, *Nye* was an adjudication of a criminal contempt arising out of a civil case. In deciding that the Criminal Appeals Rules then in effect did not apply to criminal contempt cases, the Supreme Court held that these Rules

> "... were adopted as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived in criminal cases (292 U.S. 661). In this case there was no plea of guilty, there was no verdict of guilt by a jury, and there was no finding of guilt by the court where a jury was waived. It is our view that the rules describe the kinds of cases to which they are to be applied."

This holding is correct. The words of limitation in Rule III are "entry of Judgment of Conviction." It is clear from the title of these Rules and the language of Rule III that Rule III would not apply to an appeal before a judgment of conviction.

The title of the current Rules and Rule 37 (a) (2) are void of any language limiting application to "after verdict" cases. Following the *Nye* reasoning it is logical to conclude that Rule 37 (a) (2) does apply to "before verdict" situations since the language in the title and Rule 37 (a) (2) limiting application to "after verdict" appeals has been deleted.

As mentioned above, *Nye* was decided when Rule III was in effect. The whole history of the promulgation of Rule 37 (a) (2) and the Federal Rules of Criminal Procedure presents such a changed picture from the factual

situation presented at the time of the *Nye* decision as to refute any contention that it is controlling authority for the proposition that Rule 37 (a) (2) applies only to "after verdict" cases. Also, *Nye* has been interpreted merely as standing for the proposition that the Criminal Appeals Rules did not apply to a criminal contempt case. See *Moore* v. *United States* (10 Cir. 1945), 150 F.2d 323, cert. den. 326 U.S. 740; *United States* v. *Lederer* (7 Cir. 1943) 139 F. 2d 861. This interpretation finds strength in the Act of November 21, 1941, C. 492, 55 Stat. 776 which provided that the rules would apply to criminal contempt proceedings.

(b) Rules 54 (b) (1) and 59 of the Federal Rules of Criminal Procedure require application of Rule 37 (a) (2) to the instant case.

Rule 54 (b) (1) reads as follows:

> "*Removal Proceedings* These rules apply to criminal prosecutions removed to the district courts of the United States from state courts and *govern all procedures after removal,* except that dismissal by the attorney for the prosecution shall be governed by state law." (Emphasis added)

The instant case is a criminal prosecution, begun in the Superior Court of the State of Georgia. It was removed by the defendants to the United States District Court for the Northern District of Georgia. Clearly, then Rule 54 (b) (1) applies. The phrase "govern *all* procedure after removal" must include any appeal of a remand order. A remand order can not be issued until after a case has been removed from State to Federal Court. It can not be said that appeal of a remand order is an exception to Rule 54 (b) (1) because the rule provides for only one exception, dismissal by the prosecuting attorney.

Applying the principle of *Inclusio unius est exclusio alterius*, the listing of one exception excludes all other exceptions. If appeal of a remand order were to be an exception of Rule 54 (b) (1), it would have been so stated in the Rule.

The last sentence of Rule 59 states that the Rules shall ". . . govern *all* criminal proceedings thereafter commenced . . ." To hold that Rule 37 (a) (2) does not apply to an appeal of a remand order in a criminal case ignores and contradicts the specific requirement of Rule 54 (b) (1) and the general requirement of Rule 59. The opinion of the Court of Appeals that Rule 37 (a) (2) is not applicable flies in the teeth of Rule 54 (b) (1) and can only circumvent Rule 59 by a finding that the proceedings removing the case to Federal court was civil rather than criminal. But the proceedings are criminal in nature. They are made so by Rule 54 (b) (1). They are also made so by decisions of the court. The facts of the instant case meet even the requirements of a criminal proceeding set forth by Judge Tuttle in *Zacarias* v. *United States*, 5 Cir., 1958, 261 F.2d 416. The Court of Appeals held in that case that a motion to suppress evidence brought after the defendant had been arrested, taken before a U. S. Commissioner where a complaint was filed against him, and bound over to the grand jury, was incidental to the criminal proceeding already commenced and pending. An indictment had not yet been returned against the defendant. Since the motion was ancillary to the criminal proceeding, it was held to be interlocutory and not directly appealable. The appeal was dismissed by the Fifth Circuit Court of Appeals.

The point at which a criminal proceeding begins was more fully explored by the Fifth Circuit Court of Ap-

peals in *United States* v. *Koenig*, 1961, 290 F.2d 166. Here, the government was attempting to appeal from an order sustaining a motion to suppress evidence seized. The Court held that the government could not appeal because . . . "an order to suppress has no finality because it does not of itself terminate the criminal proceedings". Certainly removal of a criminal case from State to Federal court does not terminate the criminal proceedings. The Supreme Court of the United States granted certiorari in *Koenig* and decided it together with *DiBella* v. *United States*, 1962, 369 U. S. 121. The Court said in part, at page 128:

> "... 'the final judgment rule is the dominant rule in federal appellate practice'. 6 *Moore, Federal Practice* (2d ed. 1953) 113. Particularly is this true of criminal prosecutions. See, e.g., *Parr* v. *United States*, 351 U.S. 513, 518-521. Every statutory exception is addressed either in terms or by necessary operation solely to civil actions. Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law. The Sixth Amendment guarantees a speedy trial. Rule 2 of the Federal Rules of Criminal Procedure counsels construction of the Rules 'to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay'; Rules 39 (a) and 50 assign preference to criminal cases on both trial and appellate dockets".
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> * * * * *
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> "We should decide the question here — we are free to do so — with due regard to historic principle and to the practicalities in the administration of criminal justice. An order granting or denying a pre-indictment motion to suppress does not fall within any class of independent proceedings other-

wise recognized by this Court, and there is every practical reason for denying it such recognition. To regard such a disjointed ruling on the admissibility of a potential item of evidence in a forthcoming trial as the termination of an independent proceeding with full panoply of appeal and attendant stay, entails serious disruption to the conduct of a criminal trial.[8] The fortuity of a preindictment motion may make of appeal an instrument of harassment, jeopardizing by delay the availibility of other essential evidence." (at page 129).

"Presentations before a United States Commissioner, *GoBart Co.* v. *United States,* 282 U.S. 344, 352-354, as well as before a grand jury, *Cobbledick* v. *United States,* 309 U. S. 323, 327, are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment — in each such case the order on a suppression motion must be treated as 'but a step in the criminal case preliminary to the trial thereof'. *Cogen* v. *United States,* 278 U. S. 221, 227. Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent. See *Carroll* v. *United States,* 354 U. S. 394, 404 n. 17; *In re Brenner,* 6 F. 2d 425 (C.A. 2d Cir. 1925)."

Petitioner urges that the instant case had proceeded so

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[8] "It is evident, for example, that the form of independence has been availed of on occasion to seek advantages acquired by the rules governing civil procedure, to the prejudice of proper administration of criminal proceeding, e.g., *Green* v. *United States,* 296 F 2d 841, 843-855 (C. A. 2d Cir., 1961) (extended time for appeal)."

far within the doctrine of *DiBella, Koenig* and *Zacarias, supra,* that the removal to federal court was but a step in the criminal train. The defendants had already passed the steps of arrest, commitment hearing and indictment. The State of Georgia was proceeding at full speed to give the defendants their day in court when the cases were removed to federal court. The first case was to be tried on February 17, 1964 (R. 4), the same day the removal petition was filed. Removal to federal court does not dismiss or dispense with prosecution. It merely changes the forum. No independent right is involved and the defendants can not qualify the removal as not being tied to the prosecution *in esse* as required by *DiBella.* In fact the Supreme Court has held that removal is merely a step in a criminal proceeding, therefore interlocutory and not directly appealable. In *Parr* v. *United States,* 351 U. S. 513 (1956), the defendant was indicted in one division of the Federal District Court and that court granted his motion to transfer the case to another division, on the ground that local prejudice would prevent a fair trial in the division where he was indicted. The government then obtained a new indictment for the same offenses in another district and moved in the first court for a dismissal of the first indictment. The dismissal was granted and the defendant appealed. The Court stated, in holding that the order was not appealable because it was not final, that:

> "'Final judgment in a criminal case means sentence. The sentence is the judgment.' *Berman* v. *United States,* (302 U. S. 211). And viewing the two indictments together as a single prosecution . . . the petitioner has not yet been tried, much less convicted and sentenced. The order dismissing the (first) indictment was but an interlocutory step in

> this prosecution and its review must await the conclusion of the 'whole matter litigated' between the Government and the petitioner (defendant)—namely 'the right to convict the accused of the crime, charged in the indictment'. *Heike* v. *United States*, 217 U.S. 423, at p. 429" (Explanatory words added).

The Court further held that since the order dismissing the first indictment was but a " 'step toward final disposition of the merits of the case' " it would " 'be merged in the final judgment;' " citing *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, at p. 546.

The Supreme Court added (351 U. S. at 519):

> "The lack of an appeal now will not deny effective review of a claim fairly severable from the context of a larger litigious process. *Swift & Company Packers* v. *Compania Columbiana de Caribe,* (339 U.S. 684.) at p. 689. True, the petitioner will have to hazard a trial under the Austin (second) indictment before he can get a review of whether he should have been tried in Laredo under the Corpus Christi (first) indictment, but 'bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.' *Cobbledick* v. *United States,* supra, at p. 325." (Explanatory words added)

See also, *Chicago etc. R. Co.* v. *Roberts,* 1891, 141 U. S. 690 which held that a remand order was not appealable because it was not a final order. In fact under 28 U. S. C. 1447 (d) no remand order was appealable until amended by the Civil Rights Act of 1964 giving for the first time the right to appeal a remand order in civil and criminal cases involving civil rights. Based upon the foregoing the removal must be viewed as but a part of the criminal proceeding. If the Defendants had been denied the right to appeal the remand order of the District Court an ef-

fective review could still have been had on appeal on the merits of the case.

If the removal of the instant case to federal court was part of the criminal proceeding, should not the Federal Rules of Criminal Procedure apply to its appeal?

The Petitioner unequivocally contends that these principles of law, and therefore Rule 37 (a) (2) must be applied to the case at hand.

Judge Tuttle, in holding that Rule 37 (a) (2) is inapplicable does not state what Rule or statute does govern the time limit for filing the Defendants' notice of appeal. Surely he would not advocate a limitless time to appeal. Therefore he must have applied either Rule 73 (a), Fed. R. Civil P. or Section 2107, Title 28, U. S. C. to hold this appeal timely, it being filed sixteen days after the remand order.

28 U. S. C. 2107 reads as follows:

2107 Time for appeal to courts of appeals.

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a *civil nature* before a Court of Appeals for review unless notice of appeal is filed within 30 days after entry of such judgment, order or decree." . . . (As amended May 24, 1949, c. 139, 107, 108, 63 Stat. 104) (Emphasis added)

The rule expressly provided that the action must be of a *civil nature*. Following the rulings of *Parr, DiBella, Koenig,* and *Zacarias,* all *supra,* the Petitioner respectfully urges that the instant case is not of a civil nature and therefore neither Rule 73 (a), Fed. R. Civil P. nor 28 U. S. C. 2107 can apply.

Forgetting for the moment Rule 37 (a) (2) of the

Criminal Rules, Rule 73 (a) of the Civil Rules and 28 U. S. C. 2107, should the Rules of Civil Procedure and the Rules of Criminal Procedure be intermingled at all? Counsel for Petitioner think not.

> "At times in our system the way in which courts perform their function becomes as important as what they do in the result. In some respects matters of procedure constitute the very essence of ordered liberty under the Constitution.
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> "I do not think the Constitution contemplated that there should be in any case an admixture of civil and criminal proceedings in one. Such an idea is foreign to its spirit.
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> "The founders did not command the impossible. They could not have conceived that procedures so irreconcilably inconsistent in many ways could be applied simultaneously. Nor was their purpose to create any part of judicial power,. . . wholly at large, free from any constitutional limitations or to pick and choose between the conflicting civil and criminal procedures and remedies at will. Much less was it to allow mixing civil remedies and criminal punishments in one lumped form of relief, indistinguishably compounding them and thus putting both in unlimited judicial discretion, with no possibility of applying any standard of measurement on review". Mr. Justice Rutledge, dissenting in *United States* v. *United Mine Workers of America*, 1947, 330 U. S. 258, pp 363-365.

To hold that Rule 37 (a) (2) does not apply to the case at hand contravenes every ruling of the Supreme Court and the purpose for creating the Federal Rules of Criminal Procedure. It would cause chaos in the orderly and impartial administration of justice in criminal cases.

(c) An appeal not timely filed confers no jurisdiction upon the Court of Appeals

Applying Rule 37 (a) (2), the Defendants' appeal was not timely filed. Defendants' notice of appeal was filed sixteen days after entry of the remand order. A notice of appeal in a criminal case not filed within the 10 day time limit required by Rule 37 (a) (2) confers no jurisdiction upon the Court of Appeals. *United States* v. *Robinson*, 1960, 361 U. S. 220; *Berman* v. *United States*, 1964, 378 U. S. 530.

Nowhere in this record is this Honorable Court shown any reason or excuse for the late filing of the notice of appeal. One can only surmise that these defendants, or their counsel, have slept on their right to appeal. Realizing too late that the 10 day time limit of Rule 37 (a) (2) had pasted before their notice of appeal was filed, the Defendants are trying frantically to justify the sixteen day interval as proper and to "stay in court". However, even they did not urge the novel construction given Rule 37 (a) (2) by the Court of Appeals.

For the foregoing reasons, the Court of Appeals erred in holding this appeal to be timely. Therefore, Petitioner's timely Motion to Dismiss Appeal should have been granted, as District Judge Whitehurst, sitting as a member of the Fifth Circuit panel hearing this appeal, has insisted in dissenting opinions both on the merits and on the petition for rehearing.

II. THE PETITION FOR REMOVAL DOES NOT SET OUT ANY VALID GROUND FOR REMOVAL.

(a) There is nothing in the Petition for Removal to warrant the exercise of Federal jurisdiction.

Petitioner respectfully maintains that the Petition for Removal is completely devoid of any valid ground for removal of these criminal prosecutions from State to Federal court. What it *does not contain* is more important than the skimpy allegations set forth. The Petition for Removal (R. 1-5) does *not* allege (1) that any statute or law of the State of Georgia is unconstitutional (2) that any civil right, or the enforcement thereof, of the Defendants is destroyed by any statute of the State of Georgia or by its Constitution (3) that any statute of the State of Georgia, or its Constitution creates an inability on the part of Defendants to enforce in the Courts of Georgia their equal civil rights under the United States Constitution.

Furthermore, there is a complete failure in the Petition for Removal to set out sufficient *facts* to support a removal. Only bare allegations are made that certain Defendants sought service, food, entertainment and comfort in certain restaurants and hotels in Atlanta, Georgia, and were arrested pursuant to Georgia Code Annotated 26-3005. Then appears a mere conclusionary allegation that these arrests were effected for the sole purpose of perpetuating customs and usages of the City of Atlanta with respect to serving and seating Negroes, and white persons accompanying Negroes, in places of public accommodation upon a racially discriminatory basis. They allege, in a pure conclusion, that they cannot enforce their rights in the Georgia courts, but do not allege a single *fact* showing why they cannot do so. They

do not specify one single Georgia law which prevents enforcement of their rights in the State courts. Moreover, they do not allege that any judge, law enforcement officer, prosecuting attorney, or other officer of the State of Georgia has in any way violated any of their civil rights, or prevented them from asserting any of such rights. In other words, there is no allegation of improper conduct by any State official. Even if such allegations *were* contained in the Petition for Removal, many federal decisions hold that such allegations would not justify removal. This woefully inadequate removal petition was everything that the District Court had before him when he considered, on his own motion as it was his duty to do, the question of whether a cause for removal was shown.

Petitioner will discuss briefly just a few of the controlling cases which illustrate beyond the shadow of a doubt that this case is not removable under any possible construction of the Petition for Removal.

In *Virginia* v. *Rives,* 1879, 100 U. S. 313, where two Negroes removed their pending State trial for murder to federal court, and the State of Virginia filed a petition for mandamus to the United States Supreme Court to force the remand of said cases, Justice Strong said, in part, for the Court, in granting the petition for mandamus:

> "... *But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him.* When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove

his case. By the express requirement of the statute his *petition must set forth the facts upon which he bases his claim to have his case removed,* and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." (Emphasis added)

Virginia v. *Rives,* supra, holds categorically that a case is not removable under the civil rights acts (the predecessor of 28 U.S.C. 1443) unless a State Constitution or Statute on its face denies the removing defendant his federal constitutional rights. In other words, there must be *discriminatory state legislation* depriving him of those rights before he can remove the case. Since that time, federal courts have followed that rule without deviation or modification. To list just a few, Petitioner cites *Kentucky* v. *Powers,* 1906, 201 U. S. 1; *Williams* v. *Mississippi,* 1898, 170 U. S. 213; *Murray* v. *Louisiana,* 1896, 163 U. S. 101; *Gibson* v. *Mississippi,* 1896, 162 U. S. 565; *Smith* v *Mississippi,* 1896, 162 U. S. 592; *Hull* v. *Jackson County Circuit Court,* 6 Cir., 1943, 138 F. 2d 820; *Snypp* v. *Ohio,* 6 Cir. 1934, 70 F. 2d 535, cert. den. 293 U. S. 563; *Arkansas* v. *Howard,* D.C. E.D. Ark., 1963, 218 F. Supp. 626; *North Carolina* v. *Jackson,* D.C. M.D. N.C., 1955, 135 F. Supp. 682; *Hill* v. *Pennsylvania,* D.C. W.D. Pa., 1960, 183 F. Supp. 126; *Texas* v. *Doris,* D.C., S.D. Texas, 1938, 165 F. Supp. 738; and *Neal* v. *Delaware,* 1880, 103 U.S. 370. Each of the foregoing was a criminal case, and removal was sought in each under the civil rights act.

The *Kentucky* v. *Powers* case, supra, appears to be the last Supreme Court ruling on exactly what grounds will authorize a removal under color of the civil rights acts,

and it has been followed in every instance by the lower federal courts in the cases previously cited in this section of this Brief. In *Powers*, supra, the Supreme Court said, (201 U. S. at page 30):

> "The question as to the scope of section 641 of the Revised Statutes again rose in the subsequent cases of *Neal* v. *Delaware*, 103 U. S. 370, 386; *Bush* v. *Kentucky*, 107 U. S. 110, 116; *Gibson v. Mississippi*, 162 U. S. 565, 581, 584, and *Charley Smith* v. *Mississippi*, 162 U. S. 592, 600. In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in section 641 — 'who is denied or cannot enforce in the judicial tribunals of the State or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States' — did not give the right of *removal*, unless the constitution or the laws of the State in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such State of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of *removal* under section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the constitution or laws of the State, as interpreted by its highest court. For wrongs of that character the remedy, it was held, is in the state court, and ultimately in the power of this court, upon writ of error, to protect any right secured or granted to an accused by the Constitution or laws of the United States, and which has been denied to him in the highest court of the State in which the decision, in respect of that right, could be had."

Petitioner maintains that the *Powers* case still controls the federal case law on this question of removability, and that it has not been altered, modified, or watered-down by any subsequent decision of the Supreme Court, or any inferior federal court, except by the Fifth Circuit in this case, and in *Peacock* v. *City of Greenwood*, 347 F.2d 679, (1965) which will be discussed later in this brief.

Thus, Petitioner has clearly shown that according to prevailing federal case law *discriminatory state legislation* which *interferes* with a constitutional right of defense by the defendant must exist before a case is removable under the civil rights acts. The Defendants' Petition for Removal does not allege this. The only statute they mention is Georgia Code Annotated, 26-3005, which simply makes it unlawful for any person who is on the premises of another to refuse and fail to leave said premises when requested to do so by the owner or other person in charge of said premises. There is nothing discriminatory about that statute, and nothing which in any manner deprives a defendant of any right of defense. The statute on its face has application to many situations other than racial ones. It authorizes prosecution of the drunken visitor in one's home, the person behaving in a disorderly manner in one's church, or the disreputably dressed, boisterous customer in a store, who refuses to leave when requested. If the gist of Defendants' complaint is that 26-3005 is being *unconstitutionally applied*, then they have no grounds for removal. Their remedy is to defend themselves through the State courts and then seek review by certiorari in the United States Supreme Court.

The Court of Appeals in their opinion impliedly rec-

ognize the lack of sufficient allegations in the removal petition. The majority refers to "the bare bones allegation of the existence of a right," and to "liberality of pleadings under the (Civil) rules." Circuit Judge Bell refers in his partially concurring and partially dissenting opinion to the removal petition as "notice type pleadings." In fact, the whole Court agreed to send the case back to the District Court to allow Defendants to prove the allegations of the removal petition, or as Judge Bell stated "to determine just what appellants do claim." (R. 35)

A brief summary of the legislative history of Paragraphs (1) and (2) of 28 U.S.C. 1443, under either of which these Defendants may attempt to justify removal of these cases, might be profitable here. In its present form Section 1443 sets out in two paragraphs circumstances under which civil actions or criminal prosecutions may be removed by the defendants to the federal district court embracing the place wherein the case is pending. These two types of cases are: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction thereof. Hereinafter in this Brief we will refer to this Paragraph as the "denial" clause, for the sake of brevity. (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. Hereinafter we will refer to this Paragraph as the "color of authority" clause.

The forerunner of Section 1443 was Section 3 of the first Civil Rights Act, 14 Stat. 27 (1866) enacted under power of the recently adopted Thirteenth Amendment

and prior to adoption of the Fourteenth. Section 1 of the Act confers on all persons born in the United States, of every race and color and without regard to previous condition of slavery or involuntary servitude the same rights enjoyed by white persons to contract; sue and be parties; testify; inherit, hold and dispose of property; and to the full and equal benefit of all laws and proceedings for the security of person and property, and to be subject to like punishment, pains and penalties and to none other.

Section 2 of the Act of 1866 made it a crime for any person "under color of law" to deprive any person of any right secured by the Act. Section 3 was the removal provision and authorized removal of criminal and civil causes "affecting persons who are denied or cannot enforce in the courts . . . of the State . . . any of the rights secured to them by the first section of the Act." Section 3 further authorized removal of any suit or prosecution commenced in any State court against "any officer, civil or military, or other person, for any arrest or imprisonment, trespass or wrongs done or committed under color of authority derived from this Act . . . or for refusing to do any act on the grounds that it would be inconsistent with this Act."

Thus the first part of Section 3, Act of 1866, marks the first appearance of the "denial" clause, now Paragraph (1) of Section 1443, and the latter part of Section 3 is the predecessor of the "color of authority" clause, now Paragraph (2) of Section 1443.

Although the Act of May 31, 1870, 16 Stat. 140, added the safeguard of the equal rights of citizens to vote, and defined a crime for conspiracy to injure a citizen in the

exercise of Constitutional or statutory rights, it did not significantly alter the removal section of the Act of 1866.

However, in the Revised Statutes of 1875 and 1878, former Section 1 of the Act of 1866 became Title XIV, entitled "Civil Rights", in two sections, 1977 and 1978 which are now 42 U. S. C. 1981, 1982. The jurisdictional proceedings, both original and on removal, became part of Chapter 7, Title XIII, "The Judiciary". Old Section 3 of the Act of 1866 became Section 641 (See App. A, Page 72 for complete text). Both the "denial" and the "color of authority" clauses were re-worded somewhat in Section 641, although the latter still retained the words "against any officer, civil or military, or any other person."

Section 641 became Section 31, Judicial Code of 1911, 35 Stat. 1096 without any real change. However, the 1948 codification of Title 28, U. S. C. made a number of changes. Procedural details were split off into other Sections and structure was altered by dropping clauses and rearranging them. The most important changes were that the words "against any officer, etc." were dropped from the "color of authority" clause, and nothing was substituted therefor. Also, the words "arrest, imprisonment, wrongs or trespass" in that clause were shortened to "any act under color of authority."

The 1948 codification of Title 28 made a significant change in the removal right of federal officers in Section 1442. Formerly the class of persons with such removal right had been limited to officers acting under the revenue laws. (Former Section 643, Title XIII; subsequently Section 33, Judicial Code of 1911, 36 Stat. 1097.) Section 1442 (a) (2) expanded this coverage to allow removal by any federal officer, or persons acting under him

for any act done under color of such office or on account of any right claimed under any Act of Congress *for the apprehension of criminals* or collection of the revenue.

With this admittedly skimpy review of the history of present Sections 1443 (1) and (2), we will discuss four federal decisions of very recent vintage which bear directly upon the issue presented in this case. The first of these is *People of the State of New York* v. *Galamison*, 2 Cir. 1965, 342 F. 2d 255, cert. den. 85 S. Ct. 1342 (April 26, 1965), where some sixty persons were being prosecuted by the State of New York for acts committed during demonstrations conducted to publicize their grievances over "the denial of equal protection of the laws to Negroes in the City, State, and Nation with reference to housing, education, employment, police action, etc." (342 F. 2d at 257). The demonstrators disrupted highway and subway traffic to the New York World's Fair, passed out leaflets at a public school in protest against lack of integration, and staged a "sit-down" at City Hall protesting the same subject. The Defendants removed their cases to the respective federal district courts having territorial jurisdiction, and the federal district courts promptly remanded the cases to the New York Courts *without evidentiary hearings*. (342 F. 2d at 258).

Before the Second Circuit Court of Appeals, the Appellants abandoned any reliance upon the "denial" clause of Section 1443 and relied entirely upon the second, or "color of authority" clause. In a most thorough, exhaustive, and scholarly analysis of the entire history of Section 1443, Judge Friendly in the majority opinion pretermitted the contention of the State of New York that Section 1443 (2), the "color of authority" clause, is lim-

ited to officers and persons assisting them or acting in some way on behalf of government. But moving beyond that contention, Judge Friendly held that the cases were not removable from state to federal district courts under the "color of authority" clause, stating in part:

> " . . . We begin by returning to the text we must construe. We have agreed with appellants that Sec. 1443 (2) affords a ground for removal separate from Sec. 1443 (1), and we are henceforth assuming, arguendo, that Sec. 1443 (2) is not limited to officers or persons acting at their instance or on their behalf. . . . "
>
> " . . . The officer granted removal under Sec. 3 of the Civil Rights Act of 1866 and its predecessor, Sec. 5 of the Habeas Corpus Act of 1863, would not have been relying on a general constitutional guarantee, but on a specific statutory order telling him to act . . . A private person claiming the benefit of Sec. 1443 (2) can stand no better; he must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him." (342 F. 2d at 264).
>
> * * * * *
>
> "(4). When the removal statute speaks of 'color of authority,' derived from 'a law providing for equal rights,' it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such law should be able to do something, and not merely to one where he may have a valid defense or be entitled to have civil or criminal liabilities imposed on those interfering with him.
>
> "(5). When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the

> historic and the recent civil rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them on all." (342 F. 2d at 271).

Thus, the Second Circuit has held, in *Galamison*, supra, and this Honorable Court has denied certiorari on the issue, that the "color of authority" clause does not authorize removal of State prosecutions to federal district courts, although the removing defendants were attempting to justify their acts of protest and resistance under color of authority of the guarantees of free speech and petition embodied in the First Amendment and applied to the States through the due process clause of the Fourteenth Amendment, the equal protection clause of the latter Amendment, and statutory protection of rights conferred by the Constitution.

It may be argued with some surface plausibility by counsel for the Defendants that the majority opinion of the Second Circuit in *Galamison, supra,* is not really damaging to their position in the instant case. They may argue, first, that *Galamison* is not in point factually with this case because here the Defendants were attempting to exercise their equal rights to public accommodations as subsequently spelled out in the Civil Rights Act of 1964, whereas in *Galamison* the Defendants were attempting to exercise their rights of peaceable assembly and freedom of speech protected by the First Amendment, and the due process clause of the Fourteenth Amendment. Secondly, the Defendants herein may argue that, if the instant cases are not removable under the "color of authority" clause, they may still be removable under the first Paragraph of Section 1443, or the "denial" clause.

These arguments, if made by the *Rachel, et al* De-

fendants, must surely fail under the majority opinion of *Galamison,* which states, in part:

> "(14) It should be made clear that the obstacles we perceive to applying Sec. 1443 (2) to removal by civil rights demonstrators would not be at all present in cases where an appropriate showing was made for the invocation of Sec. 1443 (1). An allegation that *Negroes engaged in civil rights demonstrations were being punished in the state courts whereas white persons engaging in similar demonstrations were not,* cf Cox v. Louisiana, *supra,* (379 U. S. 536 — citation supplied), *or that Negro demonstrators were required to post high bail whereas whites were not,* would constitute clear instances of denial to 'any person' of the right provided by 42 U.S.C. 1981, that 'all shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to none other'." (342 F. 2d at 271 — emphasis supplied.)

Looking at the allegations of the *Rachel, et al* removal petition in the light of the italicized words of the *Galamison* opinion setting out examples of when factual allegations pursuant to Section 1443 (1) would allege adequate grounds of "denial" to justify removal, we find no such allegations of discriminatory treatment of Negroes and white persons. In fact, the exact converse appears from the allegations of the *Rachel* removal petition, as follows:

> "Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied (to places of public accommodation and convenience) by members of the Negro race. (R. 1, 2. Explanatory words added.)

Nowhere in the removal petition for *Rachel, et al* is there a single allegation of discrimination between

Negro and white civil rights demonstrators, either as to punishment, bond setting, or anything else. Thus the *Rachel* removal petition utterly fails to meet this standard of "denial and inability to enforce rights" laid down by *Galamison*.

Further, the Second Circuit Court of Appeals in *Galamison, supra,* reiterates the exact contention that has been relied upon by counsel for Petitioner throughout the long and tedious course of this litigation in the federal courts, namely, that *Virginia* v. *Rives, Neal* v. *Delaware,* and *Kentucky* v. *Powers,* all *supra,* are still controlling and pose an absolute bar to removal of these cases under the allegations of the *Rachel, et al* removal petition. The Second Circuit majority states that what is now Section 1443 (1) "was largely deprived of effect by the decisions in (citing *Rives, Neal* and *Powers, supra,*) *"Which limited its application to denial by state laws as distinguished from state practice."* (352 F. 2d at 271. Emphasis added.) The Second Circuit goes on to predict that Congress may re-examine these restrictive decisions, "not, of course, by restricting the statute, as the dissent suggests, but by removing the restriction that had been judicially imposed on the first clause and by clarifying the scope of the second." (342 F. 2d at 271-272).

Our point is firmly this: Congress has not yet removed the judicial restriction imposed by prior decisions of this Honorable Court on removal of this type of case under the "denial" clause, and has not yet clarified the scope of such attempted removal under the "color of authority" clause. This being the case, these criminal prosecutions are not removable under either Section 1443, Paragraph (1) or Paragraph (2). Until such time as Congress takes such action, if indeed it ever will, cases

such as the instant one are not removable from State to United States District Courts at the trial level.

In one final comment on *Galamison, supra,* which counsel for Petitioner feel is most strongly in favor of our position, we must nevertheless confess a certain puzzlement in the fine distinction drawn in the majority opinion construing the "under any law providing for equal rights" clause of Section 1443 (2) between laws which are "couched in terms of equality" as distinguished from laws, of which the "due process" clause is one example, that "confer equal rights in the sense . . . of bestowing them upon all." This seems to be semantic hair-splitting. It implies apparently that some cases *might* be removable when the alleged right being exercised by the defendants which resulted in their prosecution was created by a civil rights act of Congress, for example, whereas other cases *might not* be removable when the alleged right being exercised by defendants is vested in them by the Constitution or Amendments thereto. We see no compelling reason for such a distinction. Can it be said that an Act of Congress creating or defining rights in some specific area is in some way superior to a Constitutional provision bestowing rights in other specific areas? If one is to be given superior weight over the other, should not the right conferred by the Constitution or an Amendment thereto which requires ratification by the States prevail over one conferred merely by a statutory act of Congress?

We move on more briefly to other recent cases. Since two of these cases are now pending in this Honorable Court on Petitions for Writ of Certiorari, and since we do not wish to improperly prejudice any of the parties to said actions, we will not engage in extended discussion

of the reasoning of the respective courts in said cases, except to point out important distinctions between those cases and the instant one.

In *City of Chester* v. *Anderson,* 3 Cir. 1965, 347 F. 2d 823; Pet. for Cert. filed, No. 443, the Third Circuit Court of Appeals by an eventual margin of 4 to 3 (on petition for rehearing) affirmed the district court's remand of removed State Court prosecutions. In this case the appellants relied upon the second, or "color of authority" clause of Section 1443, asserting First Amendment rights protecting freedom of speech. The majority of the Third Circuit, relying upon *Galamison,* supra, held that the cases were not removable under 28 U. S. C. 1443 (2). Both the majority and the dissent cited the *Rachel* opinion in the Fifth Circuit which this Court is now reviewing. This is still another Court of Appeals decision holding that remand was not authorized under the "color of authority" clause of 28 U. S. C. 1443. The State of Georgia, Petitioner, relies upon this case, as it applies to Paragraph (2) of said statute.

The Fifth Circuit Court of Appeals, relying almost entirely upon its opinion in the instant case, reversed an order of remand entered by the district court in *Peacock et al.* v. *City of Greenwood,* 5 Cir. 1965, 347 F. 2d 679; Pet. for Cert. filed, No. 471; and remanded the criminal prosecutions to the United States District Court for a hearing, with directions. The State Court prosecutions were for violation of a Mississippi statute making it unlawful to wilfully obstruct any public street. It was alleged in their removal petition that appellants were members of civil rights groups and at the time of their arrests they were engaged in a voter registration drive assisting Negroes to register and secure the right to vote,

as guaranteed by the Federal Constitution and by 42 U. S. C. 1971, the Civil Rights Act of 1960. It was further alleged that the Mississippi statute in question was vague, indefinite, and unconstitutional, both on its face and as applied to them, and that trial under it would contravene their First and Fourteenth Amendment rights. (347 F. 2d at 680-681.)

The Fifth Circuit Court of Appeals held that the cases were *not removable* under Section 1443 (2), the "color of authority" clause, just as the Second Circuit held in *Galamison, supra,* and as the Third Circuit held in *Chester, supra.* In this regard, the Fifth Circuit went a long step further than either the Second and Third Circuits, and decided the question pretermitted in *Galamison* and not mentioned in *Chester,* i.e. "Is removal under the 'color of authority' or second Paragraph of Section 1443 not available unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights?" The Fifth Circuit firmly answered this question in the affirmative, saying by a unanimous three-Judge Court at page 686:

> *"Thus we feel that the original language and context of Section 1443 (2) compel the conclusion that that section is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity.* This conclusion is buttressed by the fact that appellants' construction of paragraph (2) would bring within its sweep virtually all the cases covered by paragraph (1), thereby rendering that paragraph of no purpose and effect. Paragraph (1) requires a denial or the inability to enforce equal right in the state court. If paragraph (2) covers all who act under laws providing for equal rights, as appellants contend, this requirement

> could be avoided simply by invoking removal under the second paragraph. Paragraph (1) is an adequate vehicle for the protection and vindication of the rights of appellants, and *we find no warrant for giving paragraph (2) the strained and expansive construction here urged.*" (Emphasis supplied.)

Counsel for Petitioner feel justified in urging this Court that Section 1443 (2), the "color of authority" clause, can be eliminated as an adequate vehicle for removal in the instant case, in view of the foregoing decisions of three Circuit Courts of Appeal, with none *contra* to our knowledge.

We will not discuss the further decision of the Fifth Circuit in *Peacock*, supra, with which we firmly and respectfully disagree, that the cases *were* removable under the "denial" or first clause of Section 1443, except to note that the rationale of the unanimous Court is based almost entirely upon the *Rachel, et al.* case which is now being reviewed.

We do wish to point out some important factual differences between *Peacock*, supra, and the instant case. In *Peacock* the removal petition alleged that the Mississippi statute was *both unconstitutional on its face and as applied*. The removal petition in *Rachel makes neither allegation* as to the Georgia trespass statute. There is *no hint* in the Petition for Removal of *Rachel, et al.* that Georgia Code Section 26-3005 *is unconstitutional on its face*, and only by a very far-fetched and strained construction of the removal petition can one reach the conclusion that it contains a claim that said Georgia Code Section is *being unconstitutionally applied.*

In the *Peacock* case, supra, the Fifth Circuit Court of Appeals cited with approval the opinion of District

Judge Clayton in *City of Clarksdale, Miss.* v. *Gertge*, N.D. Miss. 1964, 237 F. Supp. 213, in which Judge Clayton likewise held that the second, or "color of authority" clause of Section 1443 does not authorize removal unless the act for which the state prosecution was brought was done in at least a quasi-official capacity derived from a law providing for equal rights. Judge Clayton went much further, however, and also held that removal of the state prosecutions arising from racial incidents was not justified under the "denial" clause of Section 1443. He *did not hold a hearing* but *rendered his opinion on briefs directed to the face of the pleadings*, i.e., the removal petition, which was far more detailed as to alleged denial of federally protected rights in Mississippi than is the skimpy, conclusionary removal petition in the instant case.

For the foregoing reasons, Counsel for Petitioner most respectfully insist that the divided majority of the Fifth Circuit Court of Appeals erred in reversing the remand order of the District Court in this case. We insist that our motion to dismiss the appeal should have been granted because the notice of appeal was not timely filed, and we do not waive that ground. But if this Court decides the timeliness of the appeal adversely to us, and reaches the merits of this case, the removal petition still does not allege sufficient grounds to justify removal.

(b) The removal petition must stand or fall upon its allegations alone, and there is no requirement for the District Court to hold an evidentiary hearing.

The Court of Appeals held that the district court should have held a hearing, to allow the Defendants

to prove their allegations and remanded the case to the District Court for such a hearing. Petitioner maintains that this was error. We find little legal precedent for such action. Removal petitions are considered on their face, by the factual allegations, in virtually every jurisdiction except the Fifth Circuit.

In *Maryland* v. *Soper, Judge* (No. 1) 1925, 270 U. S. 9, the Supreme Court said:

> "We think the *averments of the amended petition* in this case are not sufficiently informing and specific to make a case for removal under Sec. 33." (at page 34)
>
> . . . . . .
>
> "*These averments* amount to little more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duty . . . (at page 35) . . . . . .
>
> ". . . . But they (the removing defendants) should do more than this in order to satisfy the statute (Section 33, Judicial Code, formerly Section 643, Revised Statutes). In order to justify so exceptional a procedure (removal of criminal cases to federal court), the person seeking the benefit of it should be candid, specific, and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer. As the defendants *in their statement* have not clearly fulfilled this requirement, *we must grant the writ of mandamus directing the District Judge to remand the indictment and prosecution.* Should the District Judge deem it proper *to allow another amendment to the petition for removal,* by which the *averments necessary* to bring the case within Sec. 33 are supplied, he will be at liberty to do so. Otherwise the

> prosecution is to be remanded as upon a peremptory writ." (Italics and explanatory words in parenthesis added.)

Petitioner thus maintains that the removability of a case depends on the allegations of the removal petition itself. For example, in *Birmingham* v. *Croskey*, D.C. N.D. Ala., 1963, 217 F. Supp. 947, the Courts' opinion does not mention *any* evidentiary hearing, and reads in brief portions as follows (217 F. Supp. 950-51):

> "As will become readily apparent, the foregoing *allegations* (of the removal petition) are insufficient to justify the removal of the case to this Court" (at page 950) and "Considered in the light of the aforementioned authority, the *petition for removal* to this Court *does not allege* facts sufficient to justify the removal that has been granted" (at the bottom of page 950 and top of page 951).

In other cases where remand was ordered, the following excerpts illustrate our point:

> "The *petition* is probably insufficient also for the reasons, etc." (*North Carolina* v. *Jackson*, supra at page 683); "Otherwise stated, even if the *material factual allegations of the petition* are accepted at face value, the Court is not convinced, etc." (*Arkansas* v. *Howard*, supra, at page 633.)

Petitioner could quote similar language from many other cases, showing that the allegations of the removal petitions are the only matters considered by federal district courts, and that evidentiary hearings are not required or even indicated, but we feel it is unnecessary.

See also: *City of Clarksdale* v. *Gertge*, and *People of the State of New York* v. *Galamison*, both *supra*, wherein the District Courts remanded cases without a hearing and based on the pleadings in the removal petitions.

If District Courts are required to hold prolonged and detailed hearings every time an inadequate removal petition is filed, the work load of such Courts will be greatly increased. Such petitions should be, and have been in the past, considered strictly in the light of the facts alleged therein. Therefore, the District Court properly remanded the case without a hearing.

III. ASSUMING ARGUENDO THAT REMAND TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING WAS PROPER, THE DIRECTIONS GIVEN THE LOWER COURT WERE CLEARLY ERRONEOUS.

The majority of the Court of Appeals directed the lower court to dismiss the prosecutions, if upon the hearing it appeared that racial reasons were the cause of Defendants' removal from the various restaurants. No discretion whatever was left to the District Court by these directions, except to make a finding of fact as to that one issue.

(a) The aforesaid directions to the lower Court unduly limited the judicial discretion of that Court in applying the evidence to the doctrine of Hamm v. City of Rock Hill.

As Circuit Judge Bell points out (R. 34), such a holding is tantamount to applying *Hamm* in all its sweep against trespass statutes, retroactively to the State of Georgia, and is in effect a holding that Georgia has applied and will continue to apply its trespass statute contrary to the teachings of this Honorable Court in *Hamm*, even though *Hamm* had not been decided when the cases were in the State Courts, and even though those

State Courts have not had an opportunity to deal with these cases in the light of *Hamm*.

This holding assumes that *any* trespass prosecution growing out of racial causes is automatically abated by *Hamm*. *Hamm* does not hold this. It is strictly limited to peaceful and non-violent attempts to exercise a right to be served in places of public accommodation, without regard to race, color or creed. A number of recent Supreme Court decisions have also stressed the peaceful and non-violent actions of defendants prosecuted in various types of "sit-in" demonstrations. These cases are *Thompson* v. *City of Louisville*, 1962, 362 U. S. 199; *Shuttlesworth* v. *City of Birmingham, Ala.*, 1963, 373 U. S. 262; *Peterson* v. *City of Greenville, S. C.*, 1963, 373 U. S. 244; and *Griffin* v. *Maryland*, 1964, 378 U. S. 130. If the evidence should show violence or vandalism on the part of Defendants, *Hamm* would not be applicable.

Another issue which might arise from the evidence in a hearing is whether or not any one of the restaurants involved is in fact a place of public accommodation within the meaning of the Civil Rights Act of 1964. The District Court should be allowed to determine these matters upon the evidence, and not be restricted to one issue as he is at present under the majority decision of the Court of Appeals.

(b) The District Court's remand order should have been affirmed, and the criminal prosecutions returned to Fulton Superior Court, thus allowing the Courts of Georgia to consider the cases in the light of the Hamm decision.

Counsel for Petitioner respectfully submit that the Court of Appeals has gone one step further than this Honorable Court has ever done, in returning the cases to the District Court with directions to dismiss same if one specific finding, i.e., racial causes for the arrests of Defendants, is made. This wrests jurisdiction of the cases from the Georgia Courts without giving them a chance to apply the latest ruling of this Honorable Court. And there is not a single allegation in the Petition for Removal which indicates that the Defendants will not be treated completely fairly in the Georgia Courts, in the light of *Hamm*. Counsel for Petitioner agree with Circuit Judge Bell's opinion that Defendants should be required to show that Georgia Courts will not apply *Hamm* fairly to them. If they fail to do this, the cases should be remanded to the State courts.

Counsel for the Defendants might conceivably argue in their Brief that the vitality of Circuit Court Judge Bell's partially dissenting opinion in this case as to the course which he feels should be taken by the District Court upon a hearing, upon which Petitioner relies heavily, has been sapped by Judge Bell's more recent opinion in *Peacock*, supra, in which he said in part, in a footnote, while writing the opinion of the Court:

> "6. Proof of the allegations in this case would establish removal jurisdiction and *ipso facto* entitle appellants to dismissal of their prosecutions by the District Court. Failure of proof would require remand to the state court for trial. (347 F. 2d at 684)

Such an argument, if made, would ignore the vital fact that the Supreme Court of Georgia in *Bolton* v. *State*, 1965, 220 Ga. 632, 140 S.E. 2d 866, applied the doctrine of *Hamm* and abated several State Court tres-

pass convictions. Apparently there has been no such recognition of the controlling effect of *Hamm* by the highest appellate court of the State of Mississippi — at any rate, no such opinion is cited in *Peacock*, supra, and counsel for Petitioner know of no such opinion. This is a very important and indeed crucial distinction between *Peacock* and *Rachel*. Where the highest Court of the State of Georgia has unanimously recognized and followed the majority opinion of this Honorable Court, jurisdiction at the trial level should not be wrested from the Georgia Courts until they have been given an opportunity to consider these cases in the light of *Hamm*, supra, and *Bolton*, supra. Neither of these cases had been decided by the United States Supreme Court or the Supreme Court of Georgia, respectively, when the *Rachel, et al*, defendants removed their cases to the federal district court, and District Judge Boyd Sloan remanded them to Fulton Superior Court.

Any possible conjecture that Georgia Courts will not fairly apply the doctrine of *Hamm* to any and all defendants similarly situated to these Defendants should have been laid to rest in *Bolton*, supra. The Negro defendants in *Bolton* were convicted for violation of the same anti-trespass law involved in the instant case, for sitting down in, and refusing to leave a public eating place in Athens, Georgia, after having been refused service. The Supreme Court of Georgia, in reversing the convictions, said in part, in a unanimous opinion:

> ". . . So applying the rules of Sec. 201 (b) (2), (c) of the Civil Rights Act of 1964 to the facts of this case, we find and hold that this public eating place offers to serve interstate travelers and under the majority holding of the Supreme Court of the United States in *Hamm* v. *City of Rock Hill (South*

Carolina), and *Lupper* v. *State of Arkansas*, 379 U. S. 306 (13 L.E. 2d 300), both of which were decided in one opinion on December 14, 1964, these convictions must be vacated and the prosecutions dismissed, notwithstanding the offense charged against each of these defendants was committed and convictions therefor were obtained prior to the passage of the Civil Rights Act of 1964. In those two cases the majority held that the Civil Rights Act of 1964 forbids discrimination in specified places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. While those majority holdings do not accord with our conception of the meaning and purpose of the provisions of the Constitution of this State and the Constitution of the United States which prohibit the enactment of ex post facto or retroactive laws (Code Sec. 1-128, 2-302), we are, under our oaths, nevertheless required to follow them and we will therefore do so in these cases; and being so required, *we therefore hold that these pending convictions are abated by the 1964 Civil Rights Act* and it is ordered that the sentences imposed on each of these defendants be vacated *and that the charge against each defendant be dismissed.*" (Emphasis supplied)

Counsel for Petitioner most respectfully insist that the Georgia Courts should be afforded an equal opportunity to rule on these cases, unless Defendants can show that their equal rights will be denied them in the Georgia Courts.

CONCLUSION

As previously stated in Petitioner's Summary of Argument, counsel for Petitioner are not concerned with the future outcome of these prosecutions if they are remanded to the State Courts. We are deeply concerned,

however, with the issues of whether the notice of appeal was timely filed, whether these cases are removable to federal district court under the meager allegations of the removal petition, and whether the directions given by the Court of Appeals to the District Court to dismiss the prosecutions upon the finding of one factor only were erroneous.

Counsel for Petitioner therefore respectfully urge this Honorable Court:

(1) To hold that the time limit for filing a notice of appeal of the remand order in the instant case is controlled by Rule 37 (a) (2), Fed. R. Crim. P.; that the appeal thus is not timely; that the Court of Appeals therefore had no jurisdiction to entertain the appeal and should have granted Petitioner's timely motion to dismiss; and to reverse the decision of the Court of Appeals without ruling upon the merits of this case.

(2) In the event this Court rules adversely to Petitioner's first ground and holds that Defendants' appeal is timely, to hold that these State prosecutions are not removable under 28 U.S.C. 1443 (1) (2) based on the allegations in Defendants' Petition for Removal; that an evidentiary hearing by the District Court is not proper or required; that the allegations of the removal petition must be considered on its face, without supplementation by oral evidentiary hearings before the District Court; and to reverse the decision of the Court of Appeals on the merits, thus giving effect to the original Order of Remand entered by the District Court returning these prosecutions to Fulton Superior Court.

(3) In the event this Court rules adversely to Petitioner's first two grounds, and holds that the appeal was

timely, and that the Court of Appeals was correct in returning the case to the District Court for an evidentiary hearing, to hold that the instructions given by the Court of Appeals to the District Court to dismiss the prosecutions if one sole finding of fact is made, i.e., that the removal of the Defendants from the various places of public accommodation was done for racial reasons, were erroneous, and to reverse that portion of the decision of the Court of Appeals. We urge this Court in that event to hold that the District Court, upon such evidentiary hearing, could and should consider any and all factors relevant to the removability of these cases, and that these Defendants should be required to prove in such a hearing that they cannot receive fair trials in Georgia Courts, in view of the *Bolton* decision, supra, by the Georgia Supreme Court, before the District Court would be authorized to retain jurisdiction of the cases, and that should the Defendants fail to prove this, the District Court should remand the cases to Fulton Superior Court.

Therefore, Petitioner insists that the decision of the

Fifth Circuit Court of Appeals should be reversed, in whole or in part.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Georgia, Fulton County

I, J. Robert Sparks, of counsel for the State of Georgia, Petitioner, certify that I have this day served copies of the foregoing Brief for Petitioner and Appendix, upon Defendants by depositing in the United States Post Office in Atlanta, Georgia two copies of same in an envelope addressed to Donald L. Hollowell and Howard Moore, Jr., Esquires, Attorneys at Law, 859½ Hunter Street, N.W., Atlanta, Georgia 30314; two copies of same in an envelope addressed to Jack Greenberg, Esquire, Attorney at Law, 10 Columbus Circle, New York, New York 10019; and two copies of same in an envelope addressed to Professor Anthony G. Amsterdam, Esquire, Attorney at Law, University of Pennsylvania Law School, Philadelphia, Pennsylvania; counsel of record for Defendants, with sufficient first class postage affixed thereto, plus air mail postage for Mr. Greenberg's and Mr. Amsterdam's copies.

This 26th day of November, 1965.

J. Robert Sparks
Assistant Solicitor General
Atlanta Judicial Circuit

APPENDIX "A"

PERTINENT PARTS OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT I, CONSTITUTION OF THE UNITED STATES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ACT OF 1866, SEC. 3 (14 STAT. 27, 28)

"An Act to protect all persons in the United States in their Civil Rights, and furnish the means of their vindication.

"Section 3. And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the

State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March 3, eighteen hundred and sixty-three, and all acts amendatory thereof.

ACT OF 1887, SECS. 2 AND 5
(24 STAT. 553, 555)

"Section 2. . . . . Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

"Section 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections 641, or in 642, or

in 643, or in 722, or in title 24 of the Revised Statutes of the United States, or mentioned in section 8 of the act of Congress of which this act is an amendment, or in the act of Congress approved March 1, 1875, entitled 'An act to protect all citizens in their civil or legal rights.' "

ACT OF 1875, SEC. 5 (18 STAT. 472)

"Section 5. That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, ... , the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

SECTION 71, FORMER TITLE 28, U. S. C.
(JUDICIAL CODE, SEC. 28)

". . . . Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal from the decision of the district court so remanding such cause shall be allowed. . . . . ."

SECTION 74, FORMER TITLE 28, U. S. C. (JUDICIAL CODE, SEC. 31)

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforsesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . . . ."

SECTION 76, FORMER TITLE 28, U. S. C. (JUDICIAL CODE, SEC. 33)

"When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority

claimed by such officer or other person under any such law, ... the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court. . . . . .; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, ..."

ACT OF FEBRUARY 24, 1933,
C. 119, 47 STAT. 904

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, and in the Court of Appeals of the District of Columbia.

Sec. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and of preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

Sec. 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they

shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Approved, February 24, 1933.

ACT OF MARCH 8, 1934,
C. 49, 48 STAT. 399

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of February 24, 1933 (ch. 119), entitled "An Act to give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict" (U.S.C., title 28, sec. 723a), be, and the same is hereby, amended to read as follows:

"That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States: *Provided,* That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

"Sec. 2. The right of appeal shall continue in those

cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

"Sec. 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force."

Approved, March 8, 1934.

ACT OF JUNE 29, 1940, C. 445, 54 STAT. 688

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, in the United States Court for China, and in proceedings before United States commissioners. Such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect.

Approved, June 29, 1940.

ACT OF NOVEMBER 21, 1941, C. 492, 55 STAT. 776

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act entitled "An Act to give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict", approved February 24, 1933 (47 Stat. 904, U. S. C., title 18, sec. 688), as amended, and the provisions of the Act entitled "An Act to give the Supreme Court of the United States authority to prescribe rules of practice, pleading, and procedure with respect to proceedings in criminal cases prior to and including verdict, or finding or plea of guilty", approved June 29, 1940 (54 Stat. 688, U. S. C., title 18, sec. 687), are hereby extended to proceedings to punish for criminal contempt of court.

Approved, November 21, 1941.

ACT OF JUNE 25, 1948, C. 645, 62 STAT. 683, SECTIONS 3731 & 3732

§ 3731. Appeal by United States

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the validity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where

such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a circuit court of appeals, or the United States Court of Appeals for the District of Columbia, the Supreme Court of the United States shall remand the case to the circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, which shall then have jurisdiction to hear and determine the same

as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any circuit court of appeals or to the United States Court of Appeals for the District of Columbia, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

§ 3732. Taking of Appeal; Notice; Time—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Taking appeal; notice, contents, signing; time, Rule 37 (a).

SECTION 1443, TITLE 28, U. S. C.

"Section 1443. Civil rights cases

"Any of the following civil actions or criminal prosecutions, commmenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. (June 25, 1948, c. 646, 62 Stat. 938.)"

SECTION 1446 (a), (c), (d), TITLE 28, U. S. C.

"Section 1446. Procedure for removal

"(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

". . . . . .

"(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

"(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

SECTION 1447 (c), (d), TITLE 28, U. S. C.

"Section 1447. Procedure after removal generally

". . . . . .

"(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

"(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. (June 25, 1948, c. 646, 62 Stat. 939, amended May 24, 1949, c. 139, Section 84, 63 Stat. 102.)"

SECTION 2107, TITLE 28, U. S. C.

"Section 2107. Time for Appeal to Court of Appeals.

"Except as otherwise provided in this section, no appeal shall bring any judgment, order, or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed within thirty days after the entry of such judgment, order or decree.

"In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry . . . . . "

CIVIL RIGHTS ACT OF 1964, 78 STAT. 241
(Pp. 289-291)

§201:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . .

* * * * * * * *

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment . . .

"(c) The operations of an establishment affect com-

merce within the meaning of this title if . . . it serves or offers to serve interstate travelers . . ."

§203:

"No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."

SECTION 1404, TITLE 18 U. S. C.

Section 1404, Motion to Suppress — Appeal by the United States

In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence made before the trial of a person charged with a violation of —

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), or

(3) The Act of July 11, 1941, as amended (21 U. S. C., sec. 184a).

This section shall not apply with respect to any such

motion unless the United States attorney shall certify, to the judge granting such motion, that the appeal is not taken for purposes of delay. Any appeal under this section shall be taken within 30 days after the date the order was entered and shall be diligently prosecuted. Added July 18, 1956, c. 629, Title II, Sec. 201, 70 Stat. 573.

SECTION 1981, TITLE 42 U. S. C.

"Section 1981. Equal Rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce tracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

REVISED STATUTES, TITLE XIII,
THE JUDICIARY, SEC. 641

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid; or for refusing to do any act on the ground that it would be inconsistent with such law, such suit

or prosecution, may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceeding in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . . . But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed." (Note: No mention made here of remand orders, except upon failure to file copies of proceedings in circuit court, or of the right to appeal a remand order.)

RULE 37 (a) (2), TITLE 18, U. S. C.

"Rule 37. Taking Appeal; and Petition for Writ of Certiorari

"(a) . . . . . .

"(1) . . . . . .

"(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. . . . . ."

RULE 45 (a), TITLE 18, U. S. C.

"Rule 45. Time

"(a) Computation. In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday."

RULE 54 (b) (1), TITLE 18, U. S. C.

Rule 54. Application and Exceptions

"(b) Proceedings.

"(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law."

RULE 59, TITLE 18, U. S. C.

Rule 59. Effective Date.

These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

RULE 73 (a), TITLE 28, U. S. C.

"Rule 73. Appeal to a Court of Appeals

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which such an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, ..."

GEORGIA CODE ANNOTATED, 26-3005

"26-3005. Refusal to leave premises of another when ordered to do so by owner or person in charge. — It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Acts 1960, p. 142.)"

RULE III, RULES OF PRACTICE AND PROCEDURE AFTER PLEA OF GUILTY, ETC. 292 U. S. 662

"III. *Appeals*. An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion . . . . ."